

WIDENER UNIVERSITY SCHOOL OF LAW

Torts (518-E3)

Fall 2009

Professor Thaddeus Pope

Contacts: Room 325; tmpope@widener.edu; 302-477-2230

Time & Place: MWH 2:00 – 3:15 p.m. in POL-104

Midterm Exam: Thursday, October 1, 2009 from 2:00 to 3:15 p.m.

Final Exam: Saturday, December 12, 2009 from 2:30 p.m. to 6:30 p.m.

I. Course Description

This is the first-year introductory course on Torts required in virtually every U.S. law school. We will analyze appellate opinions, statutory provisions, and other legal materials to: (i) extract tort law principles and rules, (ii) draw analogies and distinctions, and (iii) develop legal arguments. We will cover intentional torts and negligence.

II. Course Objectives

- A. You will develop your ability to present relevant legal arguments in a logical and coherent fashion. Using the law of torts, you will learn the process of legal analysis. The emphasis is on problem solving, *not* on memorizing and regurgitating facts, case names, case holdings or other similar information.
- B. You will learn the basic legal principles and issues commonly encountered in the tort law, so that you can begin your preparation for the bar exam and the practice of tort law. Specifically, you will learn to identify and analyze legal issues relating to tort law in unfamiliar sets of facts.
- C. You will develop legal analysis and writing abilities, through (i) exposure to and critique of legal arguments in judicial opinions and scholarly writing; (ii) participation in classroom discussion; (iii) completion of weekly problems; (iv) completion of a written midterm examination; and (v) completion of a written final examination.

III. Required Materials

- A. Primary casebook: VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS (11th ed. Foundation 2005) (ISBN-13: 978-1587788741).
- B. Black letter hornbook: KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW (3d ed. Foundation 2007) (ISBN-13: 9781599412009).
- C. Litigation documents: I will post additional and more current materials (*e.g.* pleadings, judicial opinions, articles) to the course TWEN site.

IV. Class Schedule

- A. The class will meet on Mondays, Wednesdays, and Thursdays from 2:00 to 3:15 p.m. in POL-104.
- B. The class *will not* meet on the following dates: (i) Monday, September 7th due to Labor Day, (ii) Monday, September 28th due to Yom Kippur, (iii) Wednesday, October 14th due to In-Service, (iv) Thursday, October 29th due to Professionalism Day, (v) Thursday, November 5th due to a moot court conflict, (vi) Wednesday, November 25th due to Thanksgiving, and (vii) Thursday, November 26th due to Thanksgiving. But the class *will* meet on Tuesday, October 6th because Monday classes meet that day. The last class meets on Thursday, December 3rd.
- C. Depending on class interest, I am happy to schedule an extra "review" class during the weeks before the final exam. Please email your questions to me 24 hours before such session to better enable me to answer them. I am also happy to meet, at any time during the semester, both with individual students in my office, and with small groups in the 3rd Floor Faculty Conference Room.

V. What to Do First – at the Beginning of the Semester

- A. Purchase the two required books.
- B. Register for the TWEN site with the email address that you use most regularly.
- C. If you have not used TWEN before, review the student user guide:
<http://west.thomson.com/documentation/westlaw/wlawdoc/lawstu/twqrst06.pdf>
- D. Calendar key course dates into your planner.
- E. Register with the Registrar to **type** your midterm and final exams (recommended but not required).

VI. Attendance, Preparation, and Participation

- A. Attendance: Under American Bar Association rules, 80% attendance is required to allow you to write the final exam. Attendance will be taken by passing class lists for signature at the start of each class session.
- B. Preparation: I employ only a moderate amount of lecture but lots of case method questions and problems. Consequently, students must come to class prepared to discuss the material assigned. All assigned cases must be read *and briefed*. Analyze each case using the following headings: (i) essential substantive facts, (ii) procedural posture, (iii) issues, (iv) legal principles, (v) reasoning and (vi) holding. All note problems must be considered before the applicable class session. You do not need to know the correct answer (if there is one), but know the reading material and make a reasonable effort to think about the issues raised.
- C. Warning about Preparation: Brief the cases *yourself*. Do not make use of commercially prepared outlines before writing your own brief. As Professor DeWolf (at Gonzaga Law) explains, “they are like narcotics. Initially they make you feel good (by taking away your anxiety), but precisely for that reason they have a corrosive effect upon your learning. It is as though you were taking violin lessons, and instead of playing the scales you were assigned by your teacher, you bought a tape of Itzak Perlman playing those scales.”
- D. Class Participation: *All* students are expected to participate in class discussions. If illness or emergency prevents you from being fully prepared, please notify me *before* class. I reserve the right to reward exemplary class participation by raising your grade one step (*e.g.* B+ to A-). Typically, around 10% of the class receives such a grade “bump.” Unfortunately, given the mandatory grading curves, I must impose limits and cannot reward all levels of participation in this way.
- E. Laptops: I will use an instant-poll tool in which the entire class “votes” on the answers to orally-posed problems through a browser-supported template. Accordingly, laptops are welcome. If you do not bring a laptop, I expect that you can “vote” through a neighbor’s laptop (after refreshing the browser) or through your cell phone.
- F. TWEN Participation: Students are encouraged to participate not only in class but also through the TWEN discussion boards. Start a new thread or comment on one already in progress. The best posts: (i) are full of insight and analysis (critical thinking), (ii) reference course materials, and (iii) are clearly written (organization & style).
- G. Volunteering: I will frequently ask a question that stumps the person whom I have called on. I will give that person time to think about the question, and see if they can come up with an answer. It will sometimes happen that you have an answer, and instinctively raise your hand to volunteer. I may or may not call on you at that moment. I would prefer your attempt to answer than mine, but best of

all is to continue the dialogue with the student who was initially called on. Nonetheless, to move things along I may let the volunteer help. Please be sensitive to the fact that the student who is called on often suffers from stage fright, and the most obvious things slip from their mind.

- H. Ask Questions: I begin each class by asking for both administrative and substantive questions. If you want to know what pages we will cover, please ask. If you are having trouble grasping a particular doctrine, please ask. Alternatively, send an email or start a discussion thread on TWEN.
- I. Show & Tell: The topics in this class are constantly in the news and in the plot lines of movies and broadcast shows. If you notice a story that illustrates or discusses a class topic, please send me an email or post it to a discussion thread on TWEN.

VII. Classroom Etiquette

- A. The classroom environment must be conducive to learning for all students. Distractions made possible by advances in technology may undermine that goal.
- B. Audial: During class, in addition to the usual courtesies, kindly disable and refrain from using cell phones, pagers, and any other communication device other than your laptop computer.
- C. Visual: Please refrain from displaying wallpaper, screen savers, or other material on your laptop computer that you can reasonably expect to be offensive or distracting to other students.
- D. End Time: I will be diligent about starting the class precisely at 2:00 and ending it precisely at 3:15. In return, please do not begin to pack-up while others are still trying to be engaged in the class discourse.

VIII. Grading

- A. Weekly Quizzes (20%) – see section IX
- B. Midterm Exam (20%) – see section X
- C. Final Exam (60%) – see section XI
- D. To make my calculations more objective and transparent, I convert all the above percentages into points. There are a total of 400 points for the course. The final exam is worth 240 points. The midterm exam is worth 80 points. The weekly

quizzes are worth a total of 80 points. Grading methods are more fully explained in the next three sections.

IX. Required Quizzes

- A. While I will provide informal, oral feedback during class discussions, I do not want the first *formal* feedback that you receive to be your graded midterm or final exam. Therefore, I will assign weekly multiple choice quizzes, each comprised of three questions.
- B. Due Date: You will complete the quizzes before class on the course TWEN site. I will announce and post the quizzes on most Wednesdays. They will be due by 5:00 p.m. the following Monday. I will review the quiz in Monday's class or post a feedback memo.
- C. Grading: I will grade the quizzes. The ten quizzes, in the cumulative, comprise 20% of your total course grade. Each quiz is worth eight points (four questions worth two points each) or roughly 2% of your total course grade (400 points).
- D. TWEN: Many students have found it useful to: (i) open and print the quiz, (ii) take it "offline," and then (iii) log-in and submit their answers.

X. Midterm Exam

- A. Date: The midterm exam is scheduled from 2:00 to 3:15 p.m. on Thursday, October 1, 2009.
- B. Weight: The midterm exam comprises 20% of your course grade, 80 of the 400 total course points.
- C. Grades: The only letter grade for this course is the final course grade based on the total 400 points. Nevertheless, to enable you to gauge your relative performance, I will assign letter grades to the midterm exams based on the mandatory curve. While the numeric scores compute (80 of 400 points), the letter grades are informational only.
- D. Everything else about the midterm exam is the same as for the final exam, except that the midterm is only one hour instead of four hours.

XI. Final Exam

- A. Date: The final exam is scheduled from 2:30 p.m. to 6:30 p.m. on Saturday, December 12, 2009.
- B. Weight: The final exam comprises 60% of your course grade, 240 of the 400 total course points.
- C. Format and Length: The final examination will be comprised of three roughly equal parts. The first part will include multiple choice questions. The second part will include short essay problems (10 to 30 minutes each). The third part will include a long essay problem. The essays are essentially hypothetical factual circumstances in which you will be expected to: (i) identify the legal issues, (ii) analyze the problems by applying the correct legal principles, and (iii) come to a reasonable conclusion.
- D. Coverage: The exam will test those concepts and issues either covered in assigned readings or explored during class lectures and discussions. The exam will roughly reflect the relative time and emphasis on topics in the course. For example, negligence will be more heavily tested than intentional torts.
- E. Open Book: On the exam, you will be allowed to use any written or printed materials you choose. No electronic devices are permitted.
- F. Warning about Open Book: Having your notes and materials will *not* relieve you of the need to already know the material. Indeed, it is very probable that if you do not study for this exam as you would for a closed-book exam, then you will do very poorly and perhaps not pass.
- G. ExamSoft: I strongly encourage you to register to *type* your midterm and final exams, using your laptop and special security software that you can download from the Law School's website, <<https://www.examssoft.com/widenerlaw>>. Typing your exam allows you to create a work product in a way that will be least distracting from the substance.
- H. Grading: All exams will receive a raw score from zero to 240. The raw score is meaningful only relative to the raw score of the other students in the class. The raw score will be added to the midterm and quiz scores. That total will then be converted to a scaled score, based on the class curve. For example, if the highest raw score in the class were 330/400, then that student would receive an A. The final grades will comport with Law School's grading policies and grading curve.
- I. Grading Criteria: I have posted my fall 2008 *Torts* midterm and final exams, exam feedback memoranda, and model answers to the library exam database. In addition, you might also look my *Health Law* exams to get a sense of the criteria that I employ in grading. In short, I look for:

1. An ability to identify torts issues fairly implicated by a fact pattern
 2. An ability to muster relevant evidence and authority to make arguments cogently and clearly
 2. An understanding of substantive torts doctrines
 3. An appreciation for broader policy concerns that influence how legal doctrine applies to novel situations
- J. Exam Feedback: Several weeks after the exam, I will post on the TWEN site: (i) a copy of the exam, (ii) a blank scoring sheet and explanatory memo, and (iii) model answers.
- K. Exam Review: All grades are final; there will be no negotiations regarding revisions, except to correct any mathematical or clerical errors in computing the final score. Of course, I will be happy to go over the exam with anyone who schedules an appointment to review the exam. I will give you a copy of **your** exam answers. If – after reviewing these against the exam, the feedback memo, and your notes – you have questions about your exam, please email those to me in advance of our meeting so that I can be sufficiently prepared to ensure a productive and efficient meeting.

XII. Office Hours

I look forward to talking to you outside class. There are several means of doing this:

- A. After class: I will remain in the classroom after each class for all trailing questions, until or unless we are kicked out by another class.
- B. Office: I can typically be found in my office before and after class. If this is not a convenient time, just let me know in class or by email and we can make an appointment with each other. You are welcome to drop in my office anytime, but it is best to confirm a specific time in advance. If you have a specific question, I recommend that you send me the question via email ahead of time. In this way, I can think about your question and offer my best assistance.
- C. Email: Feel free to e-mail me anytime at tmpope@widener.edu. I will try to promptly answer any question you have as soon as possible.
- D. TWEN: Whether you want to elaborate or clarify the casebook materials or class discussions, you can start a discussion thread on the TWEN site. You are encouraged to provide constructive comments within each other's threads.
- E. Lunch or Coffee: I have found that grabbing a quick lunch or coffee/tea is a good way to get to know each other. If you and one or two other students want to share a bite/coffee/tea, please let me know.

XIII. TWEN Site

You will be issued Westlaw passwords early in the semester. At that point, you must register with the TWEN site for this course:

The TWEN site will include the following materials:

- A. PowerPoint slides for each class, posted shortly before each class
- B. Links to MP3 recordings of periodic reviews and summaries
- C. Links to MP3 recordings of selected classes
- D. Weekly Quizzes (see section IX, *supra*)
- E. Statutes, cases, and other materials

Warning!! Do not permit the availability of these materials to deter you from preparing and participating in class. I provide these materials to supplement and enhance classroom learning, not to substitute for it. It is important to remember that knowledge acquisition is only one small part of law school education. I plan to do little lecturing during classes. Lectures may seem to provide more value – more content, more certainty. It may seem like you are “learning” more. But this would be poor preparation for the practice of law where there is little certainty. Furthermore, nonattendance is not an option given University and ABA attendance requirements, and the grading policy described above.

XIV. Study Aids & Reference Materials

Since Torts is a central part of the law school curriculum, there is a plethora of study aids and reference materials available in the library, on Westlaw and Lexis, and for purchase. “Study aids” are directed at law students, and often contain both sample problems and advice on taking a torts exam. “Reference materials,” on the other hand, provide clear “black letter” explanations of legal principles; but given their level of detail and sophistication, you should consult them sparingly.

While I can list just a few supplementary materials, you may find that the style of some other source really “clicks” with the way you read or think. Nevertheless, I strongly recommend using substantive materials, like those below, instead of commercial outlines or canned briefs. I have ordered the sources below roughly according to the strength of my recommendation.

A. Study Aids

1. JOSEPH W. GLANNON, *THE LAW OF TORTS: EXAMPLES AND EXPLANATIONS* (3rd ed. Aspen 2005).
2. Center for Computer-Assisted Legal Instruction (CALI), *Library of Lessons on Torts* (containing nearly 50 online, interactive tutorials on topics that we cover, ranging from 15 to 90 minutes completion time).

3. JOHN L. DIAMOND, LAWRENCE C. LEVINE & M. STUART MADDEN, UNDERSTANDING TORTS (3d ed. Matthew Bender 2007).
4. KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW (3d ed. West Concepts & Insights Series 2007) (required).
5. MARSHALL S. SHAPO, PRINCIPLES OF TORT LAW (West Concise Hornbook Series 2003).
6. EDWARD J. KIONKA, TORTS IN A NUTSHELL (5th ed. West 2005).
7. VINCENT R. JOHNSON, MASTERING TORTS: A STUDENT'S GUIDE TO THE LAW OF TORTS (3rd ed. 2005).

B. Reference Materials

1. DAN B. DOBBS, DOBBS' HORNBOOK ON THE LAW OF TORTS (West 2000) (the successor to the 1984 hornbook below).
2. DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON TORTS (5th ed. West 1984) (helpfully, the structure of this hornbook patterns that of your casebook).
3. FOWLER V. HARPER, FLEMING JAMES & OSCAR S. GRAY, THE LAW OF TORTS (3d ed. Aspen 2006) (6 volumes).
4. STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS (Bancroft-Whitney Looseleaf) (10 volumes).
5. J.D. LEE & BARRY LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION (2d ed. West Looseleaf) (5 volumes, available in Westlaw MTLLE).
6. RESTATEMENT OF THE LAW, SECOND, TORTS (ALI 1965) (available in Westlaw REST-TORTS).
7. You may also wish to read some of the cases or law review articles cited in the notes in the casebook to enhance your understanding of the assigned materials.

C. First Year Guides

There are a number of good guides on how to succeed in law school and on how to write a law school exam. I will post a bibliography of such sources on the TWEN site.

XV. Course Reading Outline

The outline below is intended to give you a sense of the course coverage. It is *not* a reading schedule. Closely (but not exactly) following its sequence, I will give the specific assignment for the following week during the prior week.

The current assignment will always be posted on the TWEN home page. Old assignments will be collected as a TWEN “document.”

1. Introduction	CB 1-16 Abraham 1-20
2. Intentional Torts	
2.1. Intent	CB 17-28 Abraham 21-32
2.1.1. Children	
2.1.2. Intent v. Negligence	
2.1.3. Insanity	
2.1.4. Transferred Intent	
2.2. Harm to Persons	
2.2.1. Battery	CB 28-37
2.2.2. Assault	CB 37-40
2.2.3. False Imprisonment	CB 40-50
2.2.4. Intentional Infliction of Emotional Distress	CB 50-66
2.3. Harm to Property	Abraham 36-45
2.3.1. Trespass to Land	CB 66-75
2.3.2. Trespass to Chattels	CB 75-81
2.3.3. Conversion	CB 81-90
2.4. Privileges	Abraham 32-36
2.4.1. Consent	CB 91-103
2.4.2. Self-Defense	CB 103-106
2.4.3. Defense of Others	CB 106-107
2.4.4. Defense of Property	CB 107-113
2.4.5. Recovery of Property	CB 113-118
2.4.6. Necessity	CB 118-124
2.4.6.1. Public	
2.4.6.2. Private	
2.4.7. Authority of Law	CB 125-126
2.4.8. Discipline	CB 127-128
2.4.9. Justification	CB 128-130

3. **Negligence: Duty of Care**

- 3.1. History CB 131-132
Abraham 46-52
- 3.2. Elements CB 132-133
- 3.3. Risk v. Utility Formula CB 133-145
- 3.4. Standard of Care Abraham 60-78
 - 3.4.1. Reasonable Prudent Person CB 145-154
 - 3.4.1.1. Custom and Usage
 - 3.4.2. Special Applications of the Reasonable Person CB 154-168
 - 3.4.2.1. Emergencies
 - 3.4.2.2. Physical Disability
 - 3.4.2.3. Mental Disability
 - 3.4.2.4. Children
 - 3.4.3. Professionals
 - 3.4.3.1. Medical Malpractice CB 168-185
 - 3.4.3.2. Informed Consent CB 185-200
- 3.5. Rules of Law CB 200-204
Abraham 78-86
- 3.6. Violation of Statute CB 204-206
 - 3.6.1. Applicability of Statute CB 206-222
 - 3.6.2. Effect of Statute CB 222-229

4. **Negligence: Proving Breach**

- 4.1. Circumstantial Proof CB 229-237
Abraham 87-98
- 4.2. Res Ipsa Loquitur CB 237-258

5. Negligence: Causation in Fact

- 5.1. Sine Qua Non CB 252-262
Abraham 99-103

- 5.2. Proof of Causation CB 262-282
 - 5.2.1. “But For” Test
 - 5.2.2. Quantum of Proof Problems

- 5.3. Concurrent Causes CB 282-285
Abraham 103-117
 - 5.3.1. Multiple Cause Problems
 - 5.3.2. Substantial Factor Test

- 5.4. Problems in Determining Responsibility CB 285-292
 - 5.4.1. Defendant Identification
 - 5.4.2. Alternative and Market Share Liability

6. Negligence: Proximate (Legal) Cause

- 6.1. Unforeseeable Consequences CB 293-325
Abraham 118-136
 - 6.1.1. Connection between Negligence and Injury
 - 6.1.2. Directness/Naturalness
 - 6.1.3. Foreseeability of Harm Tests
 - 6.1.4. *Palsgraf v. Long Island R.R*

- 6.2. Forces that Break the Causal Chain CB 325-344
 - 6.2.1. Negligent Intervening Causes
 - 6.2.2. Intentional Intervening Causes

- 6.3. Public Policy – Limited Duties CB 344-355

- 6.4. Shifting Responsibility CB 355-360

[Note: at this point, we are departing from the order of the casebook.]

7. **Negligence: Defenses**

7.1. Plaintiff's Conduct	Abraham 137-157
7.1.1. Contributory Negligence	CB 587-592
7.1.2. Comparative Negligence	CB 592-601
7.1.3. Assumption of Risk	CB 601-614
7.1.3.1. Express	
7.1.3.2. Implied	
7.2. Statutes of Limitations and Repose	CB 614-621
7.3. Immunities	CB 621-659
7.3.1. Family	
7.3.2. Charities	
7.3.3. Government	
7.3.4. United States	
7.3.5. Public Officers	

8. **Negligence: Damages**

8.1. Personal Injuries	CB 519-548 Abraham 206-222
8.2. Property Damages	CB 548-550
8.3. Punitive Damages	CB 550-564

9. **Vicarious Liability**

9.1. Respondeat Superior	CB 660-667 Abraham 181-183
9.2. Independent Contractors	CB 667-673

10. **Other Important Tort Doctrines**

10.1.	Strict Liability
10.2.	Wrongful Death & Survival
10.3.	Joint Tortfeasors
10.4.	Tort Reform and Alternative Compensation Mechanisms

[Note: given time constraints, these topics will probably be covered through lecture.]